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IN THE

Supreme Court of the United States

October Term, 1966

No. 556

ATLANTIC COAST LINE RAILROAD COMPANY, a corporation, and SEABOARD AIR LINE RAILROAD COMPANY, a corporation,

Petitioners,

vs.

FLORIDA EAST COAST RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, The Chief Justice and Associates Justices of The Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit entered on July 7, 1966, which affirmed a decision of the United States District for the Middle District of Florida, determining an important question of corporation law which is in direct conflict with the corporation law of

Florida. Petitioners filed a Petition for Rehearing, which the Court of Appeals denied without opinion on August 11, 1966.

CITATIONS TO OPINIONS BELOW

The United States District Court for the Middle District of Florida, following the decision of the United States Circuit Court of Appeals, Fifth Circuit, that there was Federal jurisdiction, 28 U.S.C.A. Section 1337, *Florida East Coast Ry. v. Jacksonville Terminal Company, et al.*, 5 Cir., 1964, 328 F.2d, 720, cert. denied, 1964, 379 U.S. 830, 85 S.Ct. 59, 13 L ed 2d 38 entered its judgment on the merits of the controversy on July 1, 1965 (R. 147). This opinion is printed in Appendix A hereto at page 1a.

The opinion of the United States Court of Appeals, Fifth Circuit, affirming the District Court (R. 299-310) is printed in Appendix A at page 9a. The judgment of the United States Circuit Court of Appeals, Fifth Circuit (R. 311) is printed in Appendix A at page 17a.

The Order of the United States Court of Appeals, Fifth Circuit, denying Petition for Rehearing (R. 326) is printed in Appendix A hereto at page 17a.

The Order of the United States Court of Appeals, Fifth Circuit, staying proceedings herein was entered on August 19, 1966, pending filing of Petition for Certiorari, is printed in Appendix A hereto at page 18a.

JURISDICTION

The jurisdiction of this Court is invoked under Sections 2101(c) and 1254(1) of Title 28 United States Code and

Rule 19 1 (b), Rules of The Supreme Court of the United States. The judgment of the United States Court of Appeals for the Fifth Circuit entered on July 7, 1966 (R. 311) affirmed the decision of the United States District Court for the Middle District of Florida entered on July 1, 1965 (R. 147) granting a mandatory injunction requiring the dismissal of managing officials of a Florida common carrier by rail without providing for the election and qualifying of their successors contrary to the statutory law of Florida and without a prior determination of the effect of such action upon the public interest.

QUESTION PRESENTED

Whether a state statute requiring corporate officers to hold over until their successors are elected and qualified applies to a railroad corporation operated pursuant to an agreement containing no provision in conflict with such state statutory requirement, but which, because it also provides for the joint use of the corporation's facilities by its proprietary trunk line railroads, required and did receive the approval of the Interstate Commerce Commission under Section 5(2) of the Interstate Commerce Act.

STATUTES INVOLVED

Federal Court jurisdiction exists under Title 28, United States Code, Section 1337, and the Interstate Commerce Act, Title 49, United States Code, Section 1, et seq., and particularly Section 5(2).

The Florida Statutes involved are F.S.A. Sections 608.40 and 608.51:

Section 608.40:

"Every corporation shall have a President, who shall be a Director, a Secretary and a Treasurer. They shall

be chosen by the Directors and shall serve until their successors are chosen and qualify . . ."

Florida Laws 1953, Ch. 28170, Section 1, as amended, Florida Laws, Ch. 29886, Section 14.

Section 608.51:

"Failure to elect directors or appoint officers on the designated day shall not affect the existence of the corporation. In such case, the incumbent shall hold over until their successors have qualified."

Florida Laws, 1953, Ch. 28170, Section 1.

STATEMENT OF THE CASE

Jacksonville Terminal Company was incorporated under the laws of the State of Florida in 1894. Its stock is wholly owned by its proprietary trunk line railroads; Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company own 50% of the stock and Florida East Coast Railroad Company, Southern Railway Company and Georgia Southern Railway Company own the remaining 50% of the stock. Jacksonville Terminal Company is operated under an agreement between the proprietary trunk line railroads known as the operating and guaranty agreement. This agreement was entered into with the approval of the Interstate Commerce Commission under Title 49, Section 5(2), United States Code, a copy of which is printed in Appendix B hereto at page 19a. The District Court held that the original Federal jurisdiction in the first instance was based upon the approval of the operating and guaranty agreement by the Interstate Commerce Commission. Article 21 of the operating

and guaranty agreement relating to the dismissal of officers of the Jacksonville Terminal Company is the subject matter of this litigation and a copy thereof is also printed in Appendix B hereto at page 23a. The full text of the operating and guaranty agreement is printed in the record (R. 21-66).

Respondent, Florida East Coast Railway Company, filed an action in the United States District Court for the Middle District of Florida for a mandatory injunction to require the dismissal of the managing officials of the Jacksonville Terminal Company pursuant to the provisions of Article 21 of the operating and guaranty agreement. The Petitioners, Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company, recognized the right of Florida East Coast Railway Company to have the managing officials of the Jacksonville Terminal Company discharged under the agreement, but contended that such discharge could not be effected until the successors of the managing officials of the Jacksonville Terminal Company were elected and had qualified pursuant to the provisions of Sections 608.40 and 608.51 of the Florida Statutes. The United States District Court for the Middle District of Florida without taking any testimony to determine the effect of the dismissal of the operating officials of the Jacksonville Terminal Company upon the public interest, overruled the contentions of the Petitioners and entered its judgment on July 1, 1966 requiring the dismissal of the managing officials of the Jacksonville Terminal Company, Appendix A, page 1a - 8a (R. 147). The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on July 7, 1966, Appendix A, page 9a - 16a. Petition for Rehearing was denied and the Court of Appeals entered its stay order on August 19, 1966. This Petition for Certiorari followed.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important State question in a way in conflict with applicable State law. It is a matter of common knowledge that a corporation can only operate through its managing officials and employees. Additionally, a common carrier by rail is required to be operated in the public interest. It is axiomatic that the decision of the Court of Appeals and the District Court requiring the dismissal of the managing officials of the Jacksonville Terminal Company prior to the time that their successors have been selected and qualified cannot be in the public interest. Petitioners do not dispute that the Respondents have the right under Article 21 of the operating and guaranty agreement to require the dismissal of such officials but do contend that Article 21 of the agreement is silent on the point of the effective date of such dismissal and such dismissal cannot be effected except in conformity with the law of Florida.

There is no Federal Statute or precedent on this subject. In the absence of any controlling Federal policy applicable to the internal affairs of a Florida corporation, the provisions of the Florida Statutes should be the controlling law. Section 608.51 of the Florida Statutes provides, "Failure to elect directors or appoint officers on the designated days shall not affect the existence of the corporation. In such case, the incumbent shall hold over until their successors have "qualified". There is no conflict between the operations of the Florida Statutes and the right to discharge the managing officials of the terminal company as contained in Article 21 of the operating and guaranty agreement.

It is respectfully submitted, however, that I.C.C. approval of the operating and guaranty agreement required by Section 5(2) of the Interstate Commerce Act relates solely to

the use of joint facilities by the carriers and has no bearing on the Section of the agreement here in issue. The fact is that Article 21 and other Articles of the agreement unrelated to joint use of the facilities by the proprietary companies could have been the subject of a separate agreement and would not have required the I.C.C. approval. Obviously, I.C.C. approval of the agreement does not and was not intended to create an overriding Federal policy displacing State law, even though not in conflict therewith.

Even if the right to discharge contained in the operating agreement is viewed as being a Federally "approved" or "created" right (by virtue of I.C.C. approval), State law will continue to function in the absence of any conflict between State law and such Federally created "right".

Concerning this subject matter, the Supreme Court of the United States in *Wallis v. Pan American Petroleum Corporation* - U.S. - 16 L ed 2d 369, 86 S.Ct. - set forth the following guideline:

> ". . . in deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that 'Congress acts . . . against the background of the total corpus juris of the

states . . .' Hart & Wechsler, The Federal Courts and the Federal System 435 (1953). . . ."

In the *Wallis* case, supra, the Fifth Circuit Court of Appeals construed the assignability of a U.S. mineral lease which had been allegedly orally assigned by the applicant to the third party. Louisiana Law required all mineral lease assignments to be in writing. The Fifth Circuit Court of Appeals held that applicability of Louisiana Law would somehow "frustrate" the purposes of the Federal Statutes with respect to the lease of Federal lands for mining. 30 U.S.C. Section 226, Section 187, 344 F.2d 439. The Supreme Court reversed and held that the Louisiana Statute was applicable, pointing out as noted that due recognition must be given to State Law where there is no specific conflict between the application of that law and a Federally created right.

There being no Federal law on the subject and therefore no conflict between Federal and State law, clearly the State law should control thereby making the effective date of the discharge of the managing officials of the Jacksonville Terminal Company the date upon which their successors have been elected and qualify.

CONCLUSION

We respectfully submit that public interest demands that the Writ of Certiorari should be granted requiring the United States Court of Appeals for the Fifth Circuit to apply Florida law to the rights of the parties to an agreement concerning the internal management of a Florida corporation which involves no threat to any identifiable Federal policy or interest.

Respectfully submitted,

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Attorney for Petitioner, Seaboard Air Line Railroad Company

CERTIFICATE OF SERVICE

I, CLARK W. TOOLE, JR., one of the attorneys for Petitioners herein, and a member of the Bar of The Supreme Court of the United States, hereby certify that on September 14, 1966 I mailed a copy of the foregoing Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit to Messrs. Bedell, Bedell, Dittmar & Smith, attorneys for Respondent, Florida East Coast Railway Company, a corporation, 1520 Barnett National Bank Building, Jacksonville, Florida 32202 by depositing it in a United States Mail Box in Jacksonville, Florida with first class postage prepaid, addressed to the aforesaid counsel of record at counsel's foregoing address.

CLARKE W. TOOLE, JR.
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APPENDICES

APPENDIX A

JUDGMENT

(Number and Title Omitted)

United States District Court, Middle District of Florida, Jacksonville Division.

Filed Jul. 1, 1965.

This cause was heard on May 20, 1965, pursuant to the Court's order for pretrial conference. Agreeing that the essential facts are established by the pleadings and by stipulation and that no issue of fact remained for trial, counsel for the parties submitted memoranda and final argument on the merits.

In its complaint, Florida East Coast Railway Company (FEC) seeks an injunction against Jacksonville Terminal Company (Terminal Company), owner and operator of Jacksonville's railroad terminal facilities, and against Atlantic Coast Line Railroad Company (Coast Line) and Seaboard Air Line Railroad Company (Seaboard), to require those defendants immediately to join in effecting the dismissal of Marshall C. Jennette, general manager, and Elliott Adams, general counsel, of Terminal Company. The relief prayed for by Plaintiff is alleged to arise from the Interstate Commerce Act, 49 U.S.C. § 1 et seq., and an Operating and Guaranty Agreement dated December 1, 1947, under which, by authorization of the Interstate Commerce Commission (ICC), 49 U.S.C. § 5(2), FEC, Coast Line, Seaboard, and the defendants Southern Railway Company (Southern) and Georgia Southern and Florida Railway Company (Georgia South-

ern) jointly use the line and terminal facilities of Terminal Company and jointly control its organization and operation.

The Court has jurisdiction of this action as one arising under an Act of Congress regulating commerce. 28 U.S.C. § 1337; Florida East Coast Ry. v. Jacksonville Terminal Co., 328 F. 2d 720 (5 Cir. 1964).

The stock of Terminal Company, a corporation chartered by the State of Florida in 1894, is wholly owned by the other parties to this action (Railway Companies) in such proportions that the combined voting stock held by Coast Line and Seaboard is fifty per cent of the total, as is that held by FEC, Southern and Georgia Southern. Under the bylaws, the board of directors of Terminal Company consists of nine members, one of whom is its president serving ex officio and without a vote, two of whom are designated by Coast Line, two by FEC, two by Seaboard and two by Southern. It is evident that, given a division of interest between Coast Line and Seaboard, on the one hand, and FEC, Southern and Georgia Southern, on the other, neither side commands a majority of the voting stock or of the voting directors. Terminal Company's officers are elected by the board of directors and, under the by-laws, consist of a president, one or more vice presidents (there were two on February 8, 1963, when the events hereinafter described began), a secretary, treasurer, comptroller and such other officers as the directors should deem necessary. It is the president's duty to exercise general supervision over the entire business of Terminal Company (Section 7, Bylaws) and, in the president's absence or inability to act, a vice president may exercise and perform the powers and duties of the office of president (Section 9, Bylaws).

Article Twenty-first of the Operating and Guaranty Agreement provides in part:

"... that the President or General Manager (of Terminal Company), or any other officer subject to election by the Board of Directors of the Terminal Company shall be appointed and serve only by unanimous consent of the Guarantor Companies and shall (any provision of the by-laws of the Terminal Company to the contrary notwithstanding) be dismissed upon the written request of any one of the Railway Companies, and ... the dismissal of any subordinate official of the Terminal Company shall be made by the President or the General Manager upon the written request of any one of the Railway Companies."

On February 8, 1963, FEC made a written request, pursuant to Article Twenty-first, that Marshall C. Jennette be dismissed as president and general manager and that Elliott Adams be dismissed as general counsel of Terminal Company. On March 7, 1963, at the regular meeting of the directors of Terminal Company, one of the directors serving by designation of FEC moved that, in accordance with FEC's request, the directors declare the officers of president and general manager and general counsel to be vacant. The passage of that motion was defeated by the votes of Coast Line's and Seaboard's president, Coast Line's vice president and Seaboard's executive vice president, who were directors of Terminal Company by designation of Coast Line and Seaboard. Messrs. Rice and Smith, presidents of Coast Line and Seaboard, respectively, had in earlier correspondence taken the position that Mr. Adams could not be discharged as general counsel unless and until his successor was elected and qualified by Terminal Company's directors. At the March 7 meeting, as directors, they took the same position with respect to

Mr. Jennette's status as president and, with the support of the oher allied directors, they sought to carry a resolution that would have postponed Mr. Jennette's dismissal until a new president should be chosen by the board and qualified. That resolution failed of passage by reason of the negative votes of the directors serving by designation of FEC and Southern. Later the same day, at the annual stockholder's meeting, those holding the proxies of FEC, Southern and Georgia Southern attempted to pass a resolution directing the board of directors immediately to release Messrs. Jennette and Adams from the employment of Terminal Company. The passage of that motion was prevented by the negative votes of those who held the proxies of Coast Line and Seaboard's nominee.

It thus appears that although FEC and Southern have withdrawn their consent to the employment of Messrs. Jennette and Adams and have attempted to effectuate FEC's objection to their continued service through action by the stockholders and directors, Coast Line and Seaboard, having the power to effectuate or to defeat any such proposed action by the directors and stockholders, have perpetuated Messrs. Jennette and Adams in their respective positions. At each of the regular meetings of Terminal Company's directors in 1964 and 1965, representatives of Coast Line and Seaboard affirmatively attempted to elect Mr. Jennette to a new one-year term as president and general manager. Even though the directors designated by FEC and Southern on each occasion voted against Mr. Jennette, he continues to act as president and general manager of the Terminal Company. Mr. Adams likewise continues to act as general counsel for Terminal Company with the support of only Coast Line and Seaboard.

Supported in this action by the defendants Southern and Georgia Southern, FEC charges that Coast Line, Seaboard

and Terminal Company (a) violated Article Twenty-first of the Operating and Guaranty Agreement by refusing to comply with FEC's request for the dismissal of Messrs. Jennette and Adams and that, in so doing, they (b) entered into a transaction to maintain the power to control, directly or indirectly, the organization or operation of Terminal Company and participated in accomplishing the power to control the organization or operation of Terminal Company in a common interest with Coast Line and Seaboard otherwise than as approved in the Agreement by the Interstate Commerce Commission and, thus, in violation of 49 U.S.C. § 5(4).

Article Twenty-first provides that the president and general manager must be immediately dismissed from the service of Terminal Company when the Railway Companies no longer unanimously consent to his continued service and one of them requests his dismissal in writing, as was the case in February 1963. To permit two of the Railway Companies to perpetuate a particular individual in office would be inconsistent not only with the specific requirement of Article Twenty-first, but also with the purpose expressed by the signatory Railway Companies throughout the Operating and Guaranty Agreement, that Terminal Company should operate and be governed responsively to the common interest of the Railway Companies and not responsively to the interests of less than all of them.

Coast Line and Seaboard base their position primarily upon the contention that the dismissal of Messrs. Jennette and Adams can become effective only when their successors are elected and qualified.

Coast Line, Seaboard and Terminal Company claim that Section 608.40 of the Statutes of Florida requires that Mr. Jennette hold over and continue as president and general

manager until his successor has qualified. Whether that statute or prevailing case law would dictate that result in other circumstances need not be decided, since it is evident that although Terminal Company may be regarded as a distinct corporate entity to strangers, it is and should be regarded as the instrumentality of the stockholding Railway Companies, as far as their relations inter se are concerned.

It is the opinion of the Court that the very terms of the Operating and Guaranty Agreement, having been approved by the ICC under authority of the Interstate Commerce Act, are controlling, and not the provisions of the Florida statute. The U. S. Court of Appeals for the Fifth Circuit has specifically so held when this case was before it earlier. Florida East Coast Ry. v. Jacksonville Terminal Co., supra.

Although the bylaws make no provision for the election or appointment of an officer designated general counsel, they do provide for the election of "such other officers as the Board of Directors shall from time to time deem necessary" (Section 6), and the corporate minutes show that Terminal Company has retained a general counsel, sometimes known also as "senior counsel" or as "senior general counsel" since approximately the time of its organization. In 1919, the directors resolved to delegate to the president the power to appoint the general counsel. In 1930, the directors voted to fill a vacancy caused by the death of Terminal Company's "senior general counsel" and appointed Mr. Adams' predecessor to serve as general counsel at a fixed monthly salary. Effective April 1, 1947, immediately upon his predecessor's death, Mr. Adams was appointed general counsel to Terminal Company by consent of the executive committee. He has been employed continuously in that position until the present, although he requested in February 1963 that his monthly re-

tainer payment be discontinued and that he be permitted to charge Terminal Company for services on the same basis used in charging other clients. Mr. Adams still acts as general counsel to Terminal Company and, as the pleadings in this case show, he still retains that title.

The fact that a lawyer is engaged by Terminal Company to handle isolated legal matters would not standing alone constitute him an "officer subject to election by the Board of Directors" or a "subordinate official" of Terminal Company, within the meaning of Article Twenty-first. But the relationship between Terminal Companay and its general counsel cannot be likened to the relationship existing between a corporation and various lawyers engaged from time to time to render specific advice or to handle particular matters in litigation. In the organization of Terminal Company, a continuity has been maintained in the position of general counsel since 1895, with each new general counsel assuming his duties upon the death of his predecessor. As Terminal Company's general counsel, Mr. Adams has personally represented Terminal Company in numerous actions in this Court and the Courts of the State of Florida; he has advised Terminal Company with respect to legal matters not in litigation; he has, on occasion, attended meetings of the stockholders or directors of Terminal Company; as general counsel, he approved and endorsed the form of the compilation of Terminal Company's bylaws introduced in evidence in this case; he was paid a regular monthly retainer from 1947 until 1963; and he has been known as and has designated himself "general counsel" for over eighteen consecutive years.

Considering that the purpose of Article Twenty-first of the Operating and Guaranty Agreement was to assure a continuing unanimous consent by the Railway Companies to the

employment of persons occupying high positions of responsibility in the organization of Terminal Company, the Court finds that Mr. Adams, as general counsel, is an "officer subject to election by the Board of Directors" or a "subordinate official" of Terminal Company who may be discharged by the president, within the meaning of Article Twenty-first. The status of Mr. Adams is, therefore, to be determined by the same considerations as are applicable to the case of Mr. Jennette.

Upon consideration, it is

Ordered and Adjudged:

1. Terminal Company, Coast Line and Seaboard are directed to join in effecting a prompt termination of the services of Marshall C. Jennette as president and general manager of Terminal Company and of Elliott Adams as general counsel of Terminal Company; provided, however, that the withdrawal of Elliott Adams as general counsel for Terminal Company in pending litigation shall be accomplished as expeditiously as is consistent with the canons of legal ethics and the protection of Terminal Company's interests.

2. The counterclaim of Coast Line and Seaboard against FEC is dismissed.

Done and Ordered in Chambers at Jacksonville, Florida, this 1 day of July 1965.

WILLIAM R. McRAE, JR.,
Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Dated July 7, 1966

(Captions Omitted)

Before BROWN and COLEMAN, Circuit Judges, and DAWKINS, District Judge.

BROWN, Circuit Judge: Now on its second trip following our earlier holding that there was federal-question jurisdiction, 28 USCA § 1337, *Florida East Coast Ry. v. Jacksonville Terminal Co.*, 5 Cir., 1964, 328 F. 2d 720, cert. denied, 1964, 379 U.S. 830, 85 S. Ct. 59, 13 L. Ed. 2d 38, this appeal presents the merits of the controversy. That controversy essentially presents a single question: shall the law give effective recognition to the plain terms of a private contract made between experienced, mature parties of exceptional bargaining strength, the legality of which all concede and no one challenges? The answer here, as it was below, is in the affirmative. We therefore affirm.

The contract, though plain and positive, is indeed most unusual. The controversy centers around Art. 21.[1] Under it any of the owner-lines is entitled at any time to demand the dismissal of the President or General Manager of the Jacksonville Terminal, their jointly owned terminal subsidiary.

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1 " • • • the President or General Manager or any other officer subject to election by the Board of Directors of the Terminal Company, shall be appointed and serve only by the unanimous consent of the Guarantor Companies and shall (any provision of the By-Laws of the Terminal Company to the contrary notwithstanding) be dismissed upon the written request of any one of the railway companies, and • • • the dismissal of any subordinate official of the Terminal Company shall be made by the President or the General Manager upon the written request of any one of the railway companies."

Likewise, selection of a new President requires the unanimous approval of all owner-lines.[2] Since February 1963, an impasse has existed. At that time 50% of the owner-lines demanded the dismissal of Marshall C. Jennette, President and General Manager of the Company, who entered on his office shortly before on August 1, 1962.[3] The other 50% agree this demand is lawful, but they decline to do anything about it. In the meantime, Mr. Jennette continues to hold and exercise his office. The District Judge put the train back on the tracks by the order, now under review, in which the recalcitrant 50% were ordered and "directed to join in effecting a prompt termination of the services" of the President and General Counsel.

For our purposes, the background facts may be severely capsulated. In 1947 the five Railroads comprising the owner-lines[4] made an agreement for the continued joint ownership and operation of the Jacksonville Terminal and the guaranty by four of them of the payment of principal and interest on four million dollar issue of refunding bonds and other financial obligations of the Terminal. As a part of this transaction, the parties executed what is described as the Operating and

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2 This "unanimous consent" approach is found elsewhere in many other parts of the Guaranty and Operating Agreement, including issuance of new bonds, changes in accounting procedure, disbursement of certain funds, incurring debts for construction, furnishing of new facilities, issuance of capital stock, and the like.

3 The letter also demanded the dismissal of Mr. Elliott Adams, General Counsel.

4

Coastline:	Atlantic Coast Line Railroad Company	¼th
Seaboard:	Seaboard Air Line Railroad Company	¼th
FEC:	Florida East Coast Railway Company	¼th
Southern:	Southern Railway Company	⅛th
*Georgia Southern:	Georgia Southern and Florida Railway Company	⅛th

The same proportional representation was established for the 8-man Board of Directors, the Presiding Officer of which was the President.

*Georgia Southern was not one of the Guarantors.

Guaranty Agreement. Art. 21, note 1, *supra*, was contained in this agreement.

Since this pertained to the continued joint operation and control of a carrier by two or more other carriers, it was necessary to obtain approval of the Interstate Commerce Commission under § 5, 49 USCA § 5(2)[5]. The Commission by report and order formally approved the issuance of the bonds. Additionally it declared that continued joint use of the Terminal by the ownerlines "will be consistent with the public interest" and "that the terms and conditions" of the Operating and Guaranty Agreement "are just and reasonable." Although no specific mention is made of it, this approval thereby approved the much mooted Art. 21.

On February 8, 1963, FEC made a written demand that Jennette[6] be dismissed pursuant to the Operating Agreement. An effort by FEC and its allies, Southern and Georgia Southern and Georgia Southern, having a combined 50% voting power, to implement this demand by stockholder resolutions directing the Board to relieve these officers was frustrated by Coastline's and Seaboard's combined 50% opposition. Not surprising, Coastline's and Seaboard's counter move to postpone formally dismissal until a successor President was selected met a similar fate at the combined hands of FEC-Southern-Georgia. Thus with neither train deferring the right-of-way to the other at the intersection, neither can move.

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5 The report and order are found in the ICC unpublished report, Finance Docket No. 15884, Jacksonville Terminal Company Bonds and Finance Docket No. 15885, Jacksonville Terminal Company Joint Use. The bonds are described as $4,000,000 of first-mortgage bonds issued for redemption of a like aggregate principal of outstanding bonds.

6 Also named was the General Counsel Adams.

As stated before, none of the parties to the contract challenge its validity. Hence, Coastline and Seaboard as appellants here candidly recognize that FEC's written demand of February 8, 1963, was legally authorized and that no ownerline, alone or in combination, could challenge either the right to make the demand or its effectiveness as a "dismissal." But, they assert, the dismissal is not the whole thing. Rather, it is related to the *time* when the dismissal becomes effective. And for this, they bring in the Florida Corporation statutory "holdover" doctrine reflected in FSA §§608.40, 608.51.[7] Under this doctrine, so they contend, the dismissal, although binding and legal, is not effective until such time as the successor is named. They carry this argument so far as to assert that had the by-laws of the Terminal Company expressly provided what Art. 21 requires, the by-laws would have been illegal under Florida law. The whole attack rests, therefore, on application of Florida law.[8]

This attack has no merit. We would have, first, a great deal of doubt that the Florida holdover doctrine would ever serve to continue in office one who has legally been discharged. But we think that on matters having such direct

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7 §608.40:

"Every corporation shall have a president, who shall be a director, a secretary and a treasurer. They shall be chosen by the directors and shall serve until their successors are chosen and qualify. * * * "

Added Fla. Laws 1953, ch. 28170, §1, as amended Fla. Laws 1955, ch. 29886, §14.

§608.51:

"Failure to elect directors or appoint officers on the designated day shall not affect the existence of the corporation. In such case, the incumbents shall hold over until their successors have qualified."

Added Fla. Laws 1953, ch. 28170, §1.

8 Although clinging tenaciously to the idea of Florida law, asserting that this is a general rule, they cite cases from other jurisdictions and 19 Am. Jur. 2d *Corporations* §1094; 2 Fletcher, Corporations §344, at 136 (1954 rev.); 1 Nadler, Florida Corporation Law §361, at 617.

relationship to the effective operation of an important instrumentality of interstate commerce, federal, not state, standards must control. *International Ass'n of Machinists v. Central Airlines, Inc.*, 1963, 372 U.S. 682, 83 S. Ct. 956, 10 L. Ed. 2d 67; *Textile Workers Union v. Lincoln Mills*, 1957, 353 U. S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972. The fact that the physical activities of the Terminal Company may all be localized within Florida is of little consequence since it is an essential link in movements of equipment and freight to and from distant points on this web of interstate rails. Nor is there any difficulty from an absence of any formalized body of federal law. With judicial inventiveness and resourcefulness the Federal Courts are quite adequate for the task of fashioning an appropriate set of standards. *Textile Workers Union v. Lincoln Mills, supra*, 353 U. S. at 456-57, 77 S. Ct. at . . . ., 1 L. Ed. 2d at 980-81. Indeed, for one of these very carriers, there is fresh evidence of the capacity and obligation of the Courts to prescribe judicial standards to effectuate the overriding policies of Congress. See *Brotherhood of Ry. & S. S. Clerks v. Florida East Coast Ry.*, 1966 : . . . . U.S. . . . ., . . . S. Ct. . . . ., . . . L. Ed. 2d . . . (34 U.S.L. Week 4415, May 23, 1966), affirming *United States v Florida East Coast Ry.*, 5 Cir., 1965, 348 F. 2d 682, which followed this Court's earlier action in *Florida East Coast Ry. v. Brotherhood of R. R. Trainmen*, 5 Cir., 1964, 336 F. 2d 172, cert. denied, 1965, 379 U. S. 990, 85 S. Ct. 703, 13 L. Ed. 2d 611.

Approached then as a matter of Federal law, we have no doubt that the contract says what it means, means what it says, and that the law should give effect to it. No holdover doctrine, designed primarily to give continuity to a corporate enterprise in its relation to outsiders, may be applied to leave in office one who has lawfully been discharged. That the discharge could come about through the action of one, or a

minority, rather than a majority, relates to the internal management of the affairs of a jointly owned subsidiary by the owners thereof under the scheme adopted by them. *Cf. Chicago, M. & St. P. Ry. v. Minneapolis Civic & Commerce Ass'n*, 1918, 247 U. S. 490, 38 S. Ct. 553, 62 L. Ed. 1229, *Chicago, M. & St. P. Ry. v. Des Moines Union Ry.*, 1920, 254 U. S. 196, 41 S. Ct. 81, 65 L. Ed. 219. And the action of the District Judge in opening the switch does not offend the asserted policy denying ordinarily to Courts the power or right to displace corporate officers.[9]

Approval of this action by the District Court does not, as supposed by Appellants, put a binding imprimatur on the chaos they apprehend will occur when equal antagonists, persisting in their partisan jousting, fail in the required effort of unanimous selection of a successor. Several factors support us. First, there is no indication that Past is Prologue. And lest our affirmance be mistakenly read as putting any premium on a dog-in-the-manger intransigence on the part of any one of these parties who have solemnly bound themselves to act unanimously, it is plain that this independence is a powerful right which has to be exercised in the best of good faith. And if any stalemate develops in the ability to select top management, there are ample resources at hand. Not the least of these will be the Interstate Commerce Commission. Since there is a continuing obligation on the part of all of these carriers to fulfill the awesome obligations imposed by the Transportation Act, *Brotherhood of Ry. & S. S. Clerks v. Florida East Coast Ry., supra,* . . . U.S. . . ., . . . S. Ct. . . ., . . . L. Ed. 2d. . . ., the Commission is certainly open to any one or more or all of these parties or public authorities to review, in the light of current conditions, whether Art. 21 is

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9 The Appellants cite cases such as Markovitz v Markovitz, . . ., 336 Pa. 145, 8 A.2d 46, A.L.R. 359; 19 Am. Jur.2d Corporations §1111.

fair, just and reasonable for the future. This might be done either initially or by means of a reference by the District Court under the doctrine of primary jurisdiction. *Agricultural Transp. Ass'n v. King*, 5 Cir., 1965, 349 F. 2d 873; *Louisville & N. R. R. v. Knox Homes Corp.*, 5 Cir., 1965, 343 F. 2d 887. In this way the public interest which is surely at stake in the efficient operation and management of critical Terminal facilities will be fully protected.[10]

This leaves only two further matters. The first is the contention that General Counsel Adams was not an "officer subject to election by the Board of Directors" or a "subordinate official" within the meaning of Art. 21, note 1, *supra*. Again, we think the District Court was eminently correct in his conclusion that while Mr. Adams continued his association with his law firm and accepted legal employment for many other clients of his busy practice, the circumstances of his retention and long-continued employment by the Terminal Company brought him within the meaning of Art. 21.[11] The other is the cross appeal by FEC seeking attorney's fees under 49

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10 The extent to which the Operating and Guaranty Agreement is, or is claimed to be, important to the unimpeded flow of large volumes of interstate rail traffic through the Jacksonville Terminal gateway is revealed by our very recent opinion of June 1966, Brotherhood of R.R. Trainmen v. Atlantic C.L.R.R., 5 Cir., 1966, . . . F.2d . . . (No. 23659), in which we vacated an injunction against secondary picketing of Coastline by striking employees of FEC. (See the special supplemental order of the Supreme Court staying our action on conditions, 1966, . . . U.S. . . ., . . . S.Ct. . . ., . . . L.Ed.2d . . . (34 U.S.L.Week 3419, June 6, 1966). Jeopardy of the public interest becomes increasingly serious when parties (e.g., FEC, vis-a-vis, Coastline, Seaboard, or both), bound to "unanimous consent," find themselves in a severe competitive struggle for common traffic.

11 The District Court's order, with the complete approval of all parties, recognizes the ethical and professional necessity of an orderly transition of the legal affairs being handled by General Counsel Adams.

USCA §8.[12] The theory of FEC is that with Coastline and Seaboard declining to recognize the discharge under Art. 21, their persistence in allowing President Jennette to continue in office itself amounts to control and operation of a carrier (the Terminal Company) by two or more carriers in violation of §5(4), 49 USCA §5(4), since such operation is not in accordance with the approval under §5(2) of the Operating and Guaranty Agreement. Without determining whether we would approve denial of attorney's fees for the reasons discussed in *Sonken-Galamba Corp. v. Atchison, T. & S.F. Ry.*, W.D.Mo., 1939, 28 F. Supp. 456; *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry.*, D. Minn., 1952, 105 F.Supp. 794; we think the District Judge had considerable discretion. The difference has been deep and spectacular. One side wins. FEC's legal position is sustained, but this is a long way from making the conduct of Coastline and Seaboard the sort of violation of the Act as contemplated under §8. We therefore affirm denial of attorney's fees.

And now, hopefully, with this decision the Judge can step down from the locomotive cab so the railroads may run themselves. *Florida East Coast Ry. v. Brotherhood of R. R. Trainmen, supra,* 336 F. 2d at 182.

AFFIRMED.

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12 "In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

JUDGMENT ENTERED BY COURT OF APPEALS

July 7, 1966

(Caption Omitted)

Before BROWN and COLEMAN, Circuit Judges, and DAWKINS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Jacksonville Terminal Company, Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate: July 7, 1966

ORDER DENYING PETITION FOR REHEARING

Dated August 11, 1966

(Caption Omitted)

Before BROWN and COLEMAN, Circuit Judges, and DAWKINS, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is hereby DENIED.

ORDER OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Filed August 22, 1966

ON CONSIDERATION OF THE APPLICATION of the Appellants in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 19th day of August, 1966.

/s/ John R. Brown
United States Circuit Judge.

APPENDIX B

TITLE 49, SECTION 5 (2), UNITED STATES CODE

Unifications, mergers, and acquisitions of control. (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph -

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is

situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the

territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any em-

ployee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or repesentatives of its or their employees. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; Feb. 28, 1920, c. 91, § 407, 41 Stat. 580; June 16, 1933, c. 91, Title II, §§ 201, 202, 48 Stat. 217; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905; Aug. 2, 1949, c. 379, § 3, 63 Stat. 485.

ARTICLE TWENTY-FIRST - OPERATING AND GUARANTY AGREEMENT OF DECEMBER 1, 1947

And it is mutally covenanted and agreed:

Twenty-first: That the use of said station, tracks and facilities of the Terminal Company by the Railway Companies shall be subject to the jurisdiction of the Terminal Company and its duly authorized officers and employees; and the Railway Companies agree that while in or about the said terminal facilities of the Terminal Company, their employees and trains shall faithfully conform to all reasonable and proper instructions and directions of all proper officers of, and will use the proper standard time prescribed by, the Terminal Company, PROVIDED, however, that the President or General Manager, or any other officer subject to election by the Board of Directors of the Terminal Company, shall be appointed and serve only by unanimous consent of the Guarantor Companies and shall (any provision of the by-laws of the Terminal Company to the contrary notwithstanding) be dismissed upon the written request of any one of the Railway Companies; and that the dismissal of any subordinate official of any subordinate official of the Terminal Company shall be made by the President or the General Manager upon the written request of any one of the Railway Companies. The Terminal Company shall require that the services of all its officers and employees shall be performed without partially or discrimination as between the Railway Companies.